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SUMMARY RECORD OF THE 1098th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 24 October 1991, at 10 a.m.

Chairman: Mr. POCAR

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The meeting was called to order at 10.15 a.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (agenda item 4) (continued)

Second periodic report of Austria (CCPR/C/51/Add.2)

1. At the invitation of the Chairman, Mr. Berchtold, Mr. Miklau, Mr. Szymanski and Mr. Strohal took places at the Committee table.

2. The CHAIRMAN welcomed the members of the Austrian delegation, paying tribute to the outstanding contribution Austria had made over the years to the work of the Committee in the persons of Mr. Ermacora, a former member of the Committee, Mr. Herndl, former Director of the Centre for Human Rights and current member of the Committee, and Mrs. Klein, the Committee's very able Secretary.

3. He invited Mr. Berchtold, Director of the Constitutional Service at the Federal Chancellery, to introduce his country's second periodic report (CCPR/C/51/Add.2).

4. Mr. BERCHTOLD (Austria) said that in presenting his Government's second periodic report to the Committee, his delegation looked forward to continuing the dialogue that had been initiated a year previously. He drew the Committee's attention to an event too recent to appear in the report: the Second Optional Protocol regarding abolition of the death penalty was currently before the Austrian Parliament for approval and its ratification was expected in early 1992. His delegation stood ready to answer any questions the members of the Committee might wish to put. Should there be any question for which an immediate answer could not be given, it would be dealt with in Austria's next periodic report.

5. The CHAIRMAN invited the representative of Austria to respond to the questions raised in the list of issues, beginning with section I.

I. Constitutional and legal framework within which the Covenant is implemented (article 2 (2) and (3))

(a) What legislative, administrative or other measures have been taken to give effect to the rights recognized in the Covenant? Have any difficulties been faced by Austria in that regard and, if so, please provide examples.

(b) What remedies are available to individuals who claim that their rights under the Covenant have been violated? Please provide relevant examples.

(c) Please provide information on the activities of governmental institutions entrusted with the task of promoting human rights. Does the Government envisage the establishment of a National Commission on Human Rights, an Ombudsman or similar institution?

(d) What measures have been taken by the Government to increase public awareness of the Covenant and the Optional Protocol?

6. Mr. BERCHTOLD (Austria) said, in reply to question I (a), that at the time of ratifying the Covenant in 1978, Austria had already been guaranteeing fundamental human rights, both in its domestic law by means of the Basic Law of 1867, which contained a list of human rights, and by means of the European Convention on Human Rights. The latter had been ratified by Austria in 1958 and made part of domestic constitutional law in 1964, as a result of which it could be invoked as a basis for appeal to the Constitutional Court. Given that situation, the Austrian Parliament had at ratification decided not to adopt the Covenant as an integral part of domestic law but had accepted it as an instrument which lay outside domestic law but represented an obligation under international public law. That procedure thus precluded its provisions from being used as a basis for appeal to the Constitutional Court. The Parliament, however, was of the opinion that the rights and freedoms enshrined in the Covenant were already guaranteed by the laws of the country, under either constitutional law or ordinary law, through the agency of the 1867 Basic Law and the European Convention on Human Rights. Austria therefore found no difficulties in giving effect to the rights recognized in the Covenant.

7. Replying to question I (b), he explained that the body of law in Austria had two main branches, one applied by the administrative authorities and the other by the courts. The first was further subdivided into a criminal aspect and an administrative aspect and the second into civil law and criminal law.

8. In the branch of law applied by the courts, a hierarchy of courts existed through which remedies could be sought by claimants. At the lowest level were the district courts, from which appeal could be made to Länder courts, then to courts with jurisdiction over a territory comprising several Länder, and finally to the Supreme Court. Depending on the procedural level at which the initial case was heard, there was thus at least one and in some cases as many as three levels of appeal.

9. There was also a hierarchy of decision-making powers in the branch of law applied by the administrative authorities, starting with the principal district authorities, passing through the Governments of the Länder and ending with the Ministries. At each of those levels an appeal against any decision could be made to a higher level. After exhaustion of all levels of appeal in the administrative branch, the appeal could be carried further to a court which, depending on the grounds for the appeal, would be either an administrative court or the Constitutional Court. A complaint that an administrative decision constituted a violation of human rights was dealt with by the Constitutional Court, whose function it was to examine two aspects: whether a given administrative decision had itself violated a human right and whether the legal provision on which that decision rested had been in violation of a human right. In the latter case, the Court was empowered to repeal the offending provision and rescind the administrative decision against which appeal had been made.

10. As far as question I (c) was concerned, Austria did not have a national commission on human rights nor was there any intention at present to establish one. Austria had established the office of Ombudsman in 1976, following the Scandinavian model, as an institution that could be applied to in the event of any improper action on the part of an administrative authority. In Austria,

the Ombudsman was not empowered to scrutinize the judiciary since that was considered contrary to the independence of that institution. There was no government body in Austria specifically responsible for promoting human rights, since it was considered that such tasks were the province of the non-governmental organizations and private institutions which were active in such matters. All government institutions at federal and Länder level were ready to provide any information on human rights on request.

11. With regard to question I (d), as a result of the fact that the Covenant was not directly applicable in Austria and its provisions could not be invoked in a court of law or before an administrative authority, the general public was less aware of the Covenant than of the European Convention on Human Rights. However, the fact that the Committee now had before it the first two communications from individuals ever received from Austria testified to an increasing awareness of the Covenant in the country. The provisions of the Covenant covered much the same ground as the European Convention on Human Rights, particularly since the latter's amendment by its Seventh Protocol which had added a number of matters covered by the Covenant not formerly in the Convention. Since the two instruments were now virtually the same, there could be said to be general public awareness of the Covenant and its Optional Protocol.

12. Mrs. HIGGINS expressed pleasure at the opportunity for the Committee to continue its dialogue with the Austrian delegation, commending the quality of the report submitted and the clarity of the answers given to the initial questions. She also expressed appreciation of the excellent work of Mr. Herndl and Mrs. Klein, who were a great credit to their country.

13. The report was extremely informative; she regretted only that it was two years late, which had unnecessarily held up the dialogue. Furthermore, it would have been useful if, in addition to the wealth of formal information it provided on Austrian law and administrative procedures, the report could have placed those formalities in the framework of contemporary reality, describing the current social and political background against which human rights were exercised and the problems that were inevitably being experienced. Another shortcoming, which was one the Committee frequently found in reports from other European countries and to which the Austrian representative had himself referred, was the omission of a brief reference to cases that had occurred which involved the European Convention on Human Rights. Despite the fact that the European Convention was outside the purview of the Committee, the close relationship between the two instruments made any decisions in cases invoking the Convention of interest to the Committee.

14. As had been frankly pointed out in the Austrian representative's reply to question I (d), the European Convention on Human Rights had a higher public profile in European countries than did the Covenant. However, the Covenant did contain some provisions, such as its article 14, that dealt in greater detail with some rights and others, namely articles 26 and 27, that were not reflected in the Convention at all. In the Committee's eyes therefore, it was important that those rights and provisions should be publicized within European countries.

15. The operation of the constitutional machinery for protection of human rights in Austria had been clearly explained. She asked whether, since in general prevention was better than cure, there was in addition any governmental machinery for monitoring legislation in preparation to ensure its compatibility with Austria's international obligations under the Covenant. In the context of remedies available to individuals, she asked, since no case involving an individual under Austrian jurisdiction had yet come before the Committee, how complaints invoking an international instrument like the Covenant would be handled by Austria in practical constitutional terms in the light of the provisions of the Optional Protocol.

16. Mr. ANDO welcomed the Austrian delegation and also paid tribute to the contribution made by Mr. Herndl and Mrs. Klein to the work of the Committee.

17. The difference in status under Austrian law of the Covenant and the European Convention on Human Rights had been mentioned. He would like to know the reason for that difference and asked whether there was any prospect of the Covenant being incorporated into Austrian law in its entirety, in view of the fact that some of its provisions were not fully reflected in the European Convention.

18. In conclusion, he asked whether there was any likelihood of the large number of reservations Austria had made to the Covenant when it had ratified it being reduced.

19. Mr. EL SHAFEI, welcoming the Austrian delegation, said he looked forward to a fruitful and constructive dialogue between its members and the Committee. He joined previous speakers in paying tribute to the considerable contribution to the Committee's work made by Mr. Herndl and Mrs. Klein.

20. In view of the fact that the Covenant did not form an integral part of Austrian law, he asked what form of procedure had been employed to ratify it and requested a clarification of its exact legal status. Noting that the Convention Against Torture, an international instrument with the same moral force as the Covenant, had been adopted in Austria by a Constitutional Act, he wondered why the Covenant could not have been dealt with in the same manner.

21. Referring to Austria's reservation to the Optional Protocol, to the effect that the Committee should not consider any communication from an individual unless it had been ascertained that the same matter had not been examined by the European Commission of Human Rights, he asked whether that reservation precluded the Committee from dealing with communications under examination by the European Commission. Did Austria have the same reservations in connection with the United Nations Convention Against Torture since there was also a European Convention against Torture?

22. Mr. MAVROMMATIS joined previous speakers in welcoming the high-level Austrian delegation and in commending the contribution of Austrians to human rights in general and to the work of the Committee in particular. It was a special pleasure to welcome Mr. Berchtold once again. His introductory remarks and the report itself had been extremely helpful and provided a good basis for the continuation of the dialogue.

23. On the subject of the Constitutional Court, he asked whether there were any matters which could be allowed to bypass the administrative courts and go directly before the Constitutional Court. He also wondered, in reference to paragraph 36 of the report, whether any particular difficulties had been created by the fact that nullification of a law or part of a law did not have immediate effect.

24. Mr. LALLAH associated himself with other speakers in their appreciation of the high level of the Austrian delegation and in paying tribute to those Austrian nationals whose contributions in the field of human rights were so outstanding.

25. Referring to section I (d) of the list of issues, he said the Committee would find it useful to know the precise reasons why Austria had not given direct effect to the Covenant. An insight into the Government's thinking on that point might help solve the problems raised by Austria's long list of reservations. He also asked how far Austria's report had been publicized within Austria and whether it had been deposited in Parliament or discussed in the media with a view to generating public interest in Austria's international obligations. The Committee would also like to know what measures had been taken by the Government to make judges, lawyers and administrative officials aware of those same obligations, which should influence them when dealing with human rights matters. In that connection he emphasized that the Committee, through its general comments, for example, and the jurisprudence evolving under the Optional Protocol was able to help States parties implement the provisions of the Covenant. Was the fact that only two communications under the Optional Protocol had been received from Austria perhaps due to ignorance on the part of the Austrian people, and should not the Government therefore make greater efforts to publicize its obligations under the Optional Protocol, particularly bearing in mind that lawyers might in certain situations prefer to advise their clients to approach the Human Rights Committee rather than the European Commission of Human Rights?

26. While Austria's report was a competent one, it might have been more detailed in certain areas so as to provide a clearer picture of the reality in Austria.

27. Mr. MYULLERSON welcomed Austria's very able delegation and thanked Mr. Berchtold for his very clear introduction and replies to the Committee's questions. Like his colleagues he was extremely pleased to have two Austrian nationals working with the Committee: their contribution to the Committee's work could not be overemphasized.

28. Austria had presented a very clear, well-drafted and comprehensive report but more statistical data and more references to administrative decisions relevant to articles of the Covenant would have been welcome. It was to be hoped that that shortcoming would be overcome in the course of the dialogue.

29. He asked whether all the protocols to the European Convention on Human Rights had been ratified by Austria and whether they were also part of the constitutional law of the land and directly applicable in Austria.

30. Article 9 (1) of the Austrian Constitution stated that the generally recognized rules of international law were regarded as integral parts of Federal law. What was the practical significance of that article, and were the generally recognized customary rules of international law in the field of human rights, in particular the provisions of the Covenant, directly applicable in Austrian courts?

31. Lastly, he wondered whether the Austrian Government was considering withdrawing some of its reservations to the Covenant.

32. Mr. AGUILAR URBINA welcomed the Austrian delegation and said it was a pleasure to have two Austrian nationals working with the Committee. He also thanked Mr. Berchtold for his very clear statement. The report itself was satisfactory, but like other colleagues he felt that some clarifications were needed.

33. He had been particularly surprised by the large number of Austria's reservations to the Covenant and sought a specific explanation for that relating to article 26 which read: "Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." (see CCPR/C/2/Rev.2, p. 12). As there should be no different treatment of Austrian nationals and aliens under the Covenant, he wondered whether any other articles of the Covenant were thereby affected.

34. The report referred to various laws and treaties and to the European Convention on Human Rights as making up Austrian constitutional law. In that connection, he wondered whether the Austrian Constitution as a whole and its constitutional rules prohibited all types of discrimination to the extent that they were prohibited in the Covenant. Noting the statement in paragraph 69 of the Austrian report that Austrian constitutional law did not contemplate the suspension of fundamental rights, he asked whether Austria had any other law under which fundamental rights could be suspended. Lastly, he wondered what status the Covenant had in Austrian law and whether there was any legal procedure under which the provisions of the Covenant could be abrogated.

35. Mr. PRADO VALLEJO, welcoming Austria's distinguished delegation, recalled with pleasure its earlier very constructive dialogue with the Committee and expressed confidence that its second visit would produce equally good results. Austria, after all, was a highly democratic country which had played an important role in the history of Europe and of the world. It was also a pleasure to have had two Austrian nationals on the Committee and to have the very able support of a third.

36. Generally speaking, the report was satisfactory in that it provided a very comprehensive picture of Austrian legislation and even gave the impression that Austria was a human rights paradise. In reality he knew that that could not be true, yet the report did not mention any specific human rights difficulties or ways in which Austrian legislation was being improved. While, therefore, the report respected the Committee's guidelines, it might have discussed more fully the implementation of the provisions of the Covenant. It was regrettable that the Covenant had not been incorporated into Austria's

constitutional legislation and that no recourse to it appeared to be possible before Austrian courts. When analysing the reports of States parties, the Committee invariably expressed the hope that it would eventually be possible to invoke the Covenant before a court of law and it was to be hoped that that would one day be true of Austria.

37. Article 60 (3) of the Austrian Constitution stated that members of reigning houses or of formerly regnant families were excluded from eligibility for election as Federal President. He and other members of the Committee had found that provision puzzling when Austria's initial report had been considered, and continued to do so while accepting that the final decision on the subject lay with the Austrian people.

38. On the subject of the administrative courts, it appeared that one quarter of their members were civil servants: in those circumstances, could those courts really act as independent and impartial bodies at all times, particularly where a conflict of interests might be involved? He was particularly interested in that matter given the efforts that were being made in his own country to have a number of laws declared unconstitutional precisely because some judges were appointed by government ministers. He also wondered whether those courts were empowered to make decisions on compensation claims and whether individuals were able to appeal to a civil court against compensation decisions by an administrative court which they considered inadequate.

39. Lastly, he felt that Austria's reservations to the Covenant were too general in stating that certain articles would only be complied with as long as they remained compatible with Austrian legal provisions, and efforts should therefore be made to reduce their number and to make any that remained more specific.

40. Mr. SADI said that the composition of Austria's delegation was most impressive and that the Committee welcomed the opportunity to obtain information at first hand. He also paid tribute to Austria as a great European country that had made considerable progress in consolidating democracy and in promoting human rights. The report was meticulous and frank, even to the extent of including court opinions where relevant.

41. Given that Austria had in 1964 incorporated the European Convention on Human Rights into its national law, he wondered whether there were any legal obstacles to the incorporation of the Covenant as well, or whether there was some policy decision which gave precedence to the European Convention over the United Nations Covenant. If that were so, was there any mechanism whereby at least those parts of the Covenant that were not reflected in the European Convention could be incorporated into Austria's national law?

42. The reservation to which Mr. El Shafei had drawn attention, to the effect that a communication could not be considered admissible if it had already been examined by the European Commission of Human Rights, clearly demonstrated that the European Commission was considered to have priority over the Human Rights Committee and that the United Nations system was relegated to second place after the European institutions.

43. Concern had been expressed in other human rights forums about the number of reservations entered by countries, and he had heard that an effort was being made to bring the issue to the International Court of Justice for a ruling as to their legality and their conformity with the letter and spirit of the instruments concerned. He was convinced that Austria was a leading country in the observance of human rights, but the entering of so many reservations distorted the picture and was not in accordance with the spirit in which Austria had ratified the Covenant. He urged the State party to reconsider its reservations with respect both to the Covenant and to the Optional Protocol.

44. He looked forward to continuing the dialogue with the Austrian delegation.

45. Mr. WENNERGREN welcomed the Austrian delegation and expressed appreciation for the useful report and introductory comments. Thanks were also due to Austria for its contribution to the Committee's work through Mr. Ermacora, Mr. Herndl and Mrs. Klein.

46. On section I (a) of the list of issues, he had been surprised to note that no mention had been made of any difficulties experienced by Austria in giving effect to the rights recognized in the Covenant, bearing in mind that most States parties had some difficulties in complying with all its articles. He referred particularly to certain problems Austria had had in complying with the provisions of the European Convention on Human Rights on freedom of expression as, for example, in the Lingens case. What procedure would be followed in such cases? Would the issue be submitted to the Government for a formal decision or to the Nationalrat and would the judiciary hold any consultations? The difficulties that had arisen with respect to the European Convention were also likely to arise with regard to the Covenant. There might also be some problems in complying with article 19 with respect to the freedom to seek, receive and impart information, on which most States had had some difficulties. Had there been any systematic examination of that issue and, if so, who was responsible for initiating it; and was Austrian legislation fully compatible with the provisions of article 19?

47. Mr. FODOR welcomed the Austrian delegation and expressed appreciation to Mrs. Klein and Mr. Herndl, whose expertise and experience were extremely valuable to the Committee in its work. The Austrian report was a good one as to both content and format, and had been prepared in full compliance with the Committee's guidelines. It could serve as a model in many respects, though not, unfortunately, for the timing of its submission.

48. With respect to the revision of the Basic Law of 1867, during the consideration of the State party's initial report, a question had been asked concerning the recodification of legislation dealing with fundamental rights, and the head of the delegation had informed the Committee that a commission established in 1946 to revise the Basic Law had been considering the issue for 10 years and that a drafting committee established subsequently was close to completing its work. He asked whether that had now been done and, if so, with what result.

49. As Mr. Prado Vallejo had noted, the Constitution excluded members of the ruling and former ruling families from eligibility for election as President. While the need for that provision at the time of drafting had been evident, he questioned the need for its continued existence after so many years. He asked whether any action had been taken or was envisaged to amend that provision of the Constitution.

50. Mr. BERCHTOLD (Austria) thanked members of the Committee for their friendly words and critical comments. One of the main questions touched upon by many speakers was the manner in which the report should be prepared. He had prepared reports for submission to the Committee on Economic, Social and Cultural Rights in which he had included a considerable amount of statistical data and facts, but had then been criticized for doing so and had been asked to submit a more readable report in the future. Likewise, in presenting his country's initial report to the Human Rights Committee he had been criticized for dwelling too much on the European Convention on Human Rights, but members had now expressed a wish to know more about what was taking place in Strasbourg and about the jurisprudence of the Court there. He would, of course, be happy to provide such information in the third periodic report.

51. The second question touched upon had been the relationship between the European Convention and the Covenant. There was no question of giving second place to the Covenant, but the European Convention predated it and, by a special constitutional law, had been incorporated into Austria's domestic law in 1964. By the time the Covenant had been adopted in 1966, Austria had thus found itself in an unchangeable legal situation. In considering its ratification it had noted that it was worded differently from the European Convention in its provisions on the same fundamental rights, and there were doubts as to whether some provisions could be directly applicable. There had thus been some legal obstacles to dealing with the Covenant in the same manner as with the European Convention and to incorporating the Covenant as constitutional law into domestic law.

52. Austria followed a two-fold approach in dealing with treaties. In the parliamentary proceedings for the adoption of an international treaty, Parliament could decide either to adopt it in the normal way so that it became domestic law, or that it should remain an international obligation to be fulfilled by specific internal legal measures. The latter had been the case with the Covenant and it had been thought that the provisions of the Basic Law of 1867 and of the European Convention as amended by subsequent protocols would ensure compliance with the provisions of the Covenant.

53. The International Convention on the Elimination of All Forms of Racial Discrimination contained a number of provisions which Austria had found unsuitable for incorporation into domestic legislation, and it had therefore been decided to fulfil its provisions by a specific Constitutional Act, which had been adopted by Parliament in 1974.

54. In reply to a question by Mrs. Higgins, he confirmed that pre-monitoring procedures, for which his own office was responsible, had been provided for in forthcoming legislation. The text of every statute or decree was scrutinized in the light of the fundamental rights and freedoms provided for in the Covenant, the European Convention and domestic law.

55. Mrs. Higgins had also drawn attention to article 2 (3) (a) of the Covenant requiring each State party to ensure that any person whose rights or freedoms were violated would have an effective remedy. If a person complained to the Human Rights Committee that his rights under the Optional Protocol had been violated, and if the Committee ruled that Austria had failed to fulfil its obligations under article 2 (3) (a) in that regard, then the domestic legislation would have to be changed to provide for a new remedy or to allow for the use of an existing one. Several changes had, in fact, been made in the legislation to comply with decisions of the European Court.

56. On the question of reservations, Austria had encountered a number of problems in its ratification of the Covenant. For example, it had not regarded the provisions with respect to juvenile prisoners as adequate or in conformity with its own practice, and that had been one of the reasons for its reservation on that point. A second reason had been the difference that existed between the provisions of the European Convention, which had become part of the constitutional law, and the Covenant. It would always be possible to consider whether or not any of the reservations should be withdrawn.

57. With respect to the reservation on the Optional Protocol, there had been a difference of opinion in the Committee many years earlier as to how to interpret the provision in that instrument stating that the Committee was not competent to consider cases that were being examined under another procedure of international investigation or settlement. There had been a particular case in which the person concerned had first appealed to the European Commission of Human Rights and, when that body had found his complaint inadmissible, had then brought his case before the Human Rights Committee, in which a considerable difference of opinion had arisen. Austria had been concerned to avoid such discussion when ratifying the Optional Protocol and had entered a reservation that any case that had been decided upon in Strasbourg should not be brought before the Human Rights Committee.

58. Mr. MAVROMMATIS had raised the question of the Constitutional Court. There was direct access to that body once all the administrative remedies had been exhausted. Some problem arose in the case of the repeal of an Act, for which a certain time-limit was set. According to the jurisprudence of the Constitutional Court, a provision could not be re-examined by the Court within that time-limit before the repeal and the authorities had to apply it even if it had been declared unconstitutional. The intention was to avoid any gaps. The same applied to long-standing cases. Application had to be made to the Constitutional Court within a certain time-limit, failing which the right to such application was lost.

59. Replying to Mr. Lallah's questions, he said that Austria's reports were not normally publicized widely, although they were available to anyone who wished to see them. Nor were there any television broadcasts concerning the Committee's work. Specific views or general comments on certain specific problems of interest were communicated by letter to judges or the administrative authorities, but that applied only to important cases, bearing in mind that neither a judge nor the administrative authority was required to apply the provisions of the Covenant directly, but rather those of the European Convention and domestic law. That reply also answered Mr. Myullerson's similar question. All the protocols to the European Convention had been ratified,

although the ninth protocol was not yet in force and the signing of the tenth was still under consideration, but they all formed part of domestic law. No question had yet arisen with respect to the point raised by Mr. Myullerson on article 9 of the Constitution, and there had been no court decision as to whether human rights were generally recognized rules of international law. He did not know how the Constitutional Court would interpret article 9 in such a context.

60. Mr. Aguilar Urbina had drawn attention to article 26 of the Covenant with respect to differences made between citizens and foreigners. That issue had given rise to legal difficulties for Austria in ratifying the Covenant because, under the Constitution, the principle of equal treatment applied only to citizens. Following the adoption of the Constitutional Act on the International Convention on the Elimination of All Forms of Racial Discrimination, a constitutional provision had been adopted to the effect that the principle of equality must be applied to all aliens in Austria while allowing for some differences of treatment with respect to employment in certain professions, such as the civil service, for which only citizens were eligible. Some past laws which could be regarded as discriminatory, such as that requiring aliens to make a certain payment if they wished to bring a claim before a court, had been repealed. There was no suspension of fundamental rights.

61. As to whether a domestic law could abrogate the Covenant, the latter instrument was an international obligation for Austria and any abrogation would be a violation of international law.

62. Mr. Prado Vallejo had expressed surprise at the apparent absence of difficulties for Austria in giving effect to the rights recognized in the Covenant. If the word "difficulties" was taken to mean any legal situation that was contrary to Austria's obligations under the Covenant, there was certainly no such contradiction, although there might be individual cases in which a person considered his rights to have been violated.

63. On the question of the former Imperial family, there had been historical occasions in the past in which the provision referred to had been applicable but they were probably so no longer. He was not in a position to give an assurance that the provision would be repealed, but he would convey the views of members of the Committee to his Government.

64. Mr. Prado Vallejo had further asked whether it was possible for members of the administrative courts who were former civil servants to be independent. The answer was in the affirmative. A person's former functions need be no impediment to genuine independence. It was the personality of the judge that ensured his independence and no difficulties had ever been experienced in that regard.

65. There was a dual procedure with respect to the compensation of victims. Human rights cases originating in the administrative field came exclusively before the Constitutional Court and the Court decided whether or not a violation had taken place. If it decided that there had been such a violation and there had been damage to the person concerned, he could bring new proceedings before the civil courts invoking State liability, and might receive

compensation. That was admittedly a long procedure, but there was a problem in requiring the Constitutional Court to perform additional tasks when it was already overburdened.

66. Mr. Sadi had asked whether a partial incorporation of the Covenant into domestic law could be considered. That was not possible under the existing constitutional law, and in any case he doubted its advisability.

67. Mr. Wennergren had referred to the Lingens case in which the European Court of Human Rights had found a certain interpretation by a judge, but not the decision in the case, to be a violation. There were two possible solutions to avoid the possibility of that problem recurring. The first would be to point out to judges that, while they were of course independent, they might wish to bear in mind the provisions of the Covenant. The second solution would be to amend the law, particularly in respect of criminal procedure.

68. With reference to article 19, everyone had the right to impart information and ideas of all kinds and the State must not therefore restrict or interfere with that right in any way.

69. About 20 years earlier, Austria had enacted a new law on personal freedom. A drafting committee was currently discussing possible changes.

70. Mrs. HIGGINS said that she could not understand why articles 26 and 27 of the Covenant could not be brought into direct application in Austria. If the International Convention on the Elimination of All Forms of Racial Discrimination had been made operational in Austria by means of a Constitutional Act, she would like to know why the same procedure could not be applied in the case of the Covenant.

71. Austria had not reported on article 26. In that connection, she recalled that one of the problems for Austria in ratifying the Covenant had been article 26 because in certain respects equal treatment was provided only for Austrian citizens. In a general comment, the Human Rights Committee had found that the application of the principle of non-discrimination contained in article 26 was not limited to those rights which were provided for in the Covenant. It had observed however that not every differentiation of treatment would constitute discrimination, if the criterion for such differentiation was reasonable and objective and if the aim was to achieve a purpose which was legitimate under the Covenant. In that connection it could not, of course, be argued that, for example, freedom of expression should be limited only to citizens.

72. Mr. DIMITRIJEVIC shared the concern of Mrs. Higgins that in some areas Austrian law might not cover all the provisions of the Covenant.

73. In paragraph 69 of the report it was stated that Austria had not applied article 4 on the suspension of fundamental rights and that Austrian constitutional law did not contemplate the suspension of fundamental rights. He would like to know whether there was any possibility, in any circumstances, including non-political force majeure, in which article 4 would not be applied.

74. He would welcome clarification on the issue of compensation. Mr. Berchtold had said that, following a favourable decision by the Constitutional Court, the party seeking compensation from the State must go to a civil court and once again prove that he had suffered damage. Presumably, in a criminal case, the victim could apply to the criminal court. He would like to know the extent to which the decision of the Constitutional Court was binding on the civil court, which would then have to decide only on how much compensation should be paid.

75. Mr. LALLAH observed that, in the Lingens case, the views of the Committee would have been of assistance to the judges in interpreting a law which might be open to misinterpretation. There was a danger that, if the Covenant was not fully integrated in the Austrian legal system, judges might feel that it was not necessary to know about the Committee's opinions.

76. Mr PRADO VALLEJO, referring to Mr. Berchtold's statement that he knew of no case in which a judge in an administrative court had not been impartial, said that, in the Bellilos case, on 29 April 1988, the European Court of Human Rights had found that it was reasonable and legitimate to have doubts regarding the impartiality of a court made up of persons who might feel subordinate to the administration. That view provided reason to doubt whether impartiality could be guaranteed in all cases.

77. Mr. BERCHTOLD (Austria) said that, when the Covenant had been adopted, an expert committee had been set up to compare it with the European Convention on Human Rights and had drawn up a confidential report which had taken note of a number of differences in wording. Austria had three different instruments concerning human rights, namely, the Covenant, the European Convention and the Basic Law of 1867. Those concerned essentially the same rights but with different wording. Such a situation could complicate the practical application of provisions regarding human rights and that would not be advisable; Austria had therefore refrained from putting the Covenant on the same legal level as the other two instruments. He wished to emphasize, however, that it was not a question of according a secondary priority to the Covenant but only of making it easier to apply the law. Articles 26 and 27 were particular examples. The application of article 27, for instance, would have led to complications in implementing the 1955 provisions of Austrian constitutional law regarding minorities and might have necessitated application ex posteriori, which would have encountered legal obstacles. The problem could possibily be solved but it had been thought better to avoid the issue.

78. Similar considerations applied in the case of article 26. The principle of equality was guaranteed by constitutional law only to citizens. Foreigners were given equal treatment under the terms of the Constitutional Act in connection with the International Convention on the Elimination of All Forms of Racial Discrimination. There was a third provision, namely article 14 of the European Convention, which guaranteed equality to citizens and foreigners alike but only so far as rights specified in the European Convention were concerned. There were accordingly many divergent provisions.

79. All other provisions of the Covenant were applied equally because they did not differentiate between citizens and non-citizens. Those provisions of the Covenant were therefore applied in the same way for foreigners and citizens alike, as were the provisions of the European Convention.

80. In the days of the monarchy there had been an article providing for the suspension of fundamental freedoms and human rights. Following the breakdown of the monarchy, the old law had been incorporated into the legal order of the new Republic with the exception of that article. Thus, in 1918 the possibility of proclaiming a state of emergency had been abolished and the situation had remained unchanged.

81. Article 60 of the European Convention provided that nothing in the Convention should be construed as limiting or derogating from any of the human rights and fundamental freedoms which might be ensured under the laws of any High Contracting Party or under any other agreement to which it was a party. That article had been interpreted as meaning that, if the domestic situation was better than that contemplated in the European Convention, domestic law would prevail and therefore, in the case of Austria, the situation of an emergency case was excluded. It did not matter that a state of emergency was possible under the European Convention: it was not possible under Austrian domestic law. The same situation applied in the case of the Covenant.

82. There was no question of the Human Rights Committee's views not being taken seriously in Austria. It would be useful to domestic authorities, whether judicial or administrative, in interpreting the law, to know what the Committee had said in a general comment. The Austrian authorities would therefore review the Committee's general comments and would publish such comments as it deemed useful.

83. He asked Mr. Miklau of the Federal Ministry of Justice to comment on the questions regarding compensation and the independence of the judiciary.

84. Mr. MIKLAU (Austria) said that he would comment on the legal and practical situation in Austria concerning questions within the competence of the Ministry of Justice.

85. In the Lingens case, following the decision of the European Court of Human Rights, the Ministry of Justice had issued a decree to all judges and prosecutors incorporating the substance of the European Court's decision. The decree had been published in the Official Gazette of the Ministry of Justice as well as in professional magazines in which legal decisions of interest were reported.

86. That kind of information had been effective in that court decisions after 1987 had adopted ideas from the European Court and had included them as part of the reasoning in Austrian court decisions. The Oberschlick case might appear to represent an exception to that practice. However, although that case had been decided in 1990, the court decisions which formed its basis had been rendered in 1984, two years before the decision in the Lingens case, and the reasoning in the Lingens case had not therefore been available. Consideration had been given to the possibility of amending the criminal law but such action had not been thought necessary; instead, reliance had been placed on the Austrian courts' practice of interpreting the criminal law in the spirit of constitutional law which included the European Convention, article 10 of the latter being pertinent to the Oberschlick case.

87. On the issue of compensation, Mr. Berchtold had referred to cases where the Constitutional Court had declared that acts of an administrative authority had been contrary to the provisions of the Constitution and the Act regarding State liability and that the State was liable to compensate the victim of such an illegal act. There was, however, an obligatory mediation procedure before the applicant could file an action with the civil court. There had been a time-limit for that procedure of six months which had recently been reduced to three months. The purpose of the procedure was to try to find a solution between the alleged victim and the public authority which represented the State in matters of compensation. If no settlement was reached within three months under that procedure, the applicant was entitled to file an action with the civil court, which was free to decide whether or not the law had been violated by the public authority irrespective of whether there had been a previous decision to the effect that there had been such a violation. It could also provide compensation in cases where no such previous decision by the Constitutional Court existed such as, for example, in cases where an act contrary to law had occurred during criminal proceedings.

88. The CHAIRMAN announced that the Committee had completed its consideration of section I of the list of issues.

The meeting rose at 1 p.m.